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No. 88-32

IN THE

# Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,

*Petitioner,*

*against*

RICHARD N. MORASH,

*Respondent.*

**On Appeal from the Supreme Judicial Court of the State of Massachusetts**

## BRIEF OF *AMICI CURIAE* STATE OF NEW YORK, *ET AL.* IN SUPPORT OF PETITIONER, THE COMMONWEALTH OF MASSACHUSETTS

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### Statement of Interest of *Amici Curiae*

This brief is filed on behalf of 20 states as *amici curiae*, pursuant to Rules 36.1 and 36.4 of the Supreme Court Rules, in support of the brief filed by petitioner Commonwealth of Massachusetts.

The issues raised by this appeal are of critical importance to all states, including New York and the 19 other *amici curiae* joining in this brief. The Supreme Judicial Court

of the Commonwealth of Massachusetts held in this case that the preemption provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, bars a state from criminally prosecuting an employer who refuses to honor an agreement to pay wages to a worker for earned but unused vacation time when the employment relationship is terminated.

Civil and criminal wage and hour enforcement, including vacation pay regulation, is part of the traditional state role in protecting citizens in the field of labor relations. In New York and the other *amici curiae* states, state governments actively assist their citizens in recovering unpaid wages either through a wage payment statute or common law contract rights. Many of the statutes either explicitly include vacation payments or have been interpreted to apply to them. In addition, New York and many of the *amici curiae* states such as the Commonwealth of Massachusetts, impose criminal penalties for the failure to pay agreed-upon wages including vacation wages. ERISA preemption of these laws would dramatically reduce the protection that workers now receive because federal law and enforcement mechanisms do not provide sufficient remedies for workers who are wrongfully denied vacation pay. The *amici curiae* submit this brief because of their interest in retaining the ability to protect workers from abusive employment practices. Because of our substantial involvement in the enforcement of these rights, *amici curiae* have an important perspective to add to the discussion of this case.



## Summary of Argument

Payment for earned but unused vacation time upon termination of the employment relationship is not an ERISA benefit plan. This type of vacation pay is not meaningfully different from any other type of vacation pay and thus is a "payroll practice" exempt from ERISA preemption by a Department of Labor regulation. Accordingly, the decision of the Massachusetts Supreme Judicial Court which held that the State of Massachusetts was preempted from enforcing an employer's obligation to pay earned but unused vacation time should be reversed.

Furthermore, Massachusetts General Law c. 149 § 148 is a "generally applicable criminal law" excluded from ERISA preemption. This interpretation is consistent with ERISA's legislative history, the general policy against federal interference in state criminal matters, and the meaning of "generally applicable" law in analogous contexts. Where a state law, like the Massachusetts statute in this case, does not solely govern ERISA-covered areas but applies generally to many different areas, it is generally applicable. Thus, Massachusetts is not preempted from enforcing its criminal wage collection statute.

# ARGUMENT

## POINT I

### PAYMENT OF WAGES FOR EARNED BUT UNUSED VACATION TIME UPON TERMINATION OF THE EMPLOYMENT RELATIONSHIP IS NOT AN ERISA BENEFIT PLAN AND THEREFORE MASSACHUSETTS GENERAL LAW c. 149 § 148 IS NOT PREEMPTED BY ERISA

*Amici curiae* urge the Court to reverse the decision of the Massachusetts Supreme Judicial Court because the payment, at the termination of an employment relationship, of earned but unused vacation pay, whether paid in a lump sum or otherwise, is no different than payment of wages while an employee is on vacation leave. Since the payment of wages to employees is not governed by ERISA, an employer's payment of vacation pay is likewise not covered by ERISA. Thus, the decision of the Supreme Judicial Court of Massachusetts which reasoned that, because the vacation pay due in this case was to be paid in a lump sum at the end of employment, it was more like severance pay than payment of wages while on vacation leave and therefore was an employee welfare benefit plan covered by ERISA, is erroneous.

In addition, the decision of the Massachusetts Supreme Judicial Court, if affirmed, would create a fractured system of regulation of vacation wages. Wages for earned but unused vacation time paid in a lump sum at the termination of employment would be subject to federal regulation while wages paid when an employee is on vacation leave, either during the course of employment or at the termination of employment, would be subject to state regulation. The extensive system of state enforcement on behalf of citizens



who have been denied vacation pay would be preempted with no corresponding federal enforcement to take its place.

Most workers in America receive some form of paid vacation. In many instances, employers pay vacation wages either during the year when the worker takes vacation or at the end of the year as payment in lieu of vacation. Some employers pay employees who are going on vacation in a lump sum check for all of their vacation time. Many employers also pay wages to employees for earned but unused vacation time at the termination of employment. Some employers pay departing employees their vacation wages in a lump sum while others pay the wages periodically by keeping departing employees on their regular payroll until their vacation days have run out.

The Department of Labor has, by regulation, 29 C.F.R. § 2510.3-1 (1987), interpreted ERISA as not applying to certain payroll practices, including the payment of vacation pay, which although related to employee benefits, are more closely associated with normal wages. The Department has taken the position that "the payment of normal compensation out of general assets while the employee performs no duties does not usually constitute a welfare benefit plan." 40 Fed. Reg. 34,526 (Aug. 15, 1975). The regulation specifically excludes from ERISA coverage "[p]ayment of compensation while an employee is on vacation or absent on a holiday." 29 C.F.R. § 2510.3-1(b)(3)(1987).[1]

1. "[V]acation benefits" as defined and included in ERISA, 29 U.S.C. § 1002(1), apply to pooled vacation benefit plans in industries such as construction where employees work for several different employers during the year and a vacation trust fund is established out of which vacation payments are made. *See Note, Unfunded Vacation Benefits, Determining the Scope of ERISA,* 87 Colum. Law Rev. 1702, 1703 n.12 (1987). The only time this Court has interpreted this term has been in such a case. *Franchise Tax Board* v. *Construction Laborers Vacation Trust,* 463 U.S. 1 (1983).

ERISA expressly authorizes the Secretary of Labor "to prescribe such regulations as he finds necessary or appropriate to carry out the provisions" of the statute. 29 U.S.C. § 1135 (1982). Where Congress has "explicitly delegated authority to construe the statute by regulation, . . . [this Court] . . . must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious or plainly contrary to the statute." *United States* v. *Morton*, 467 U.S. 822, 834 (1984). Excluding vacation pay from ERISA coverage is a reasonable construction of the statute because, as the Department of Labor has reasoned, "paid vacations . . . are associated with regular wages or salary, rather than benefits . . . Moreover, the abuses which created the impetus for the reforms in Title I [of ERISA] were not in this area." 40 Fed. Reg. 24,642-43 (June 9, 1975).

Payment of wages for earned but unused vacation given in a lump sum at the end of employment cannot be meaningfully distinguished from the payment of wages while an employee is on vacation leave either during the course of or at the end of employment.[2] Giving unused vacation wages in one check at the termination of employment rather than during employment does not suddenly change a payroll practice into a welfare benefit plan.

The only difference between vacation wages paid during the course of employment and unused vacation pay given at the termination of employment is that in the latter situation the employment relationship is about to end or

2. The practice of keeping a departing employee on the payroll until their vacation days run out and thus paying vacation wages periodically instead of in a lump sum would fall squarely within the scope of 29 C.F.R. § 2510.3-1 (1987).



has just ended. Otherwise, they are identical in form and substance. Both are earned and calculated according to an employer's vacation policy and are paid out of the employer's general assets. Both represent pay for time when the employee is not actually working. Calculating the unused vacation time of a departing employee requires the same records and procedures as calculating the accrued vacation of an employee still on staff.

The one difference between the two forms of vacation pay—that the employment relationship is about to end or has just ended—is not a meaningful distinction. Employees often receive payment for wages earned during employment after they leave employment. For example, employees who leave employment in the middle of a pay period will often not receive the wages due them until the next pay date. Employers, such as the State of New York, which operate on a "lag" payroll[3] will not pay wages due for the last payroll period worked until one payroll period after the employee has been terminated.

Furthermore, the fact that unused vacation pay is often given in a lump sum check at the termination of employment is irrelevant because many employers also give lump sum vacation checks to employees still on staff who are about to go on vacation. Similarly, some employers who operate on a lag payroll pay departing employees all of their earned wages in a lump sum at the end of the payroll period during which they leave. There is no reason to treat payment for

3. A "lag" payroll is one where wages paid at the end of a payroll period are not for that payroll period but for the preceding payroll period. Thus, if the employee leaves during a payroll period he or she would be entitled to a check at the end of that payroll period and a check at the end of the next payroll period.

unused vacation time any differently than these other payroll practices which occur both during the employment relationship and when that relationship ends.

Conversely, payment for unused vacation pay when an employee leaves employment is, contrary to the holding of the Massachusetts Supreme Judicial Court, very different from severance pay. Unlike an employer who undertakes to provide severance benefits, an employer who pays earned but unused vacation wages is not required to develop a new or different set of administrative procedures. The records and procedures used to determine whether a departing employee is entitled to vacation wages and the amount due are the same records and procedures that are used when an employee is absent on vacation leave during the course of employment. The need for planning to meet a periodic demand for adequate funds to pay unused vacation pay is no different from the need to plan to pay lump sum vacation wages to employees who go on vacation leave during the course of employment.

Moreover, severance pay is an entirely different type of benefit, in the nature of an unemployment benefit, that occurs because of the specific event of termination and is paid upon termination. By contrast, an employee is entitled to claim unused vacation pay before termination and usually does claim it during the employment relationship. Unused vacation wages are not a separate benefit but merely represent payment for time worked for which an employee has not yet been compensated.

Because payment for unused vacation time at the termination of employment is so similar to other types of vaca-



tion pay, ERISA preemption of state enforcement in this area would result in a fractured system of regulation and enforcement of vacation pay. Preemption would split the regulation of vacation wages between federal and state jurisdictions, thus possibly subjecting each employer's vacation pay policy to both state and federal regulation. An employer's vacation pay policy would be subject to state regulation when employees were returning from vacation leave, but the same vacation policy would be subject to federal regulation when an employee was departing.

In addition, employers who provide lump sum vacation payments to employees who have resigned or been fired would be subject to federal regulation, but employers who keep departing employees on the regular payroll until their vacation days have expired would be subject to state regulation. These two situations involve the same wages, yet they would be subject to completely different regulation. Such a split system is subject to abuse; employers wishing to evade enforcement could tailor their payment for earned but unused vacation time to fall under either state or federal regulation depending on which is less strictly enforced in a particular state.

ERISA preemption of accrued vacation pay would also drastically reduce the protection that workers now have against employers who fail to pay them vacation wages. The extensive system of state regulation and enforcement in this area, both criminal and civil, would be replaced by what one commentator has called, a "regulatory vacuum." *Note, Unfunded Vacation Benefits, supra* note 1 at 1703.

In addition to Massachusetts, at least forty-six states and the District of Columbia have wage payment statutes.

Over half of the statutes in these states explicitly include, or have been interpreted to include, vacation wages.[4] In many states, these statutes have existed in some form for nearly one hundred years.[5]

Most states also provide an administrative mechanism to assist citizens in recovering unpaid wages. For example, the New York State Department of Labor, Division of Labor Standards ("Division"), employs approximately 90 investigators to pursue complaints of employer failures to pay wages including vacation wages within the state. The Division maintains eleven district and sub-district offices throughout the state to receive such complaints. In 1987, the Division collected over $4 million on behalf of citizens,

4. These states are: Arizona, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Vermont, West Virginia, and Wisconsin.

5. In New York, for example, Labor Law § 198-a and § 198-c make it a misdemeanor for an employer to fail to pay agreed-upon wages or vacation pay. This statute has existed in some form since at least 1909. Labor Law § 198-a, Historical Note (McKinney 1986). Indeed, as early as 1910, a provision requiring railroad companies to pay their workers in cash semi-monthly and making it a misdemeanor to fail to do so, survived a constitutional challenge in the New York Court of Appeals and was found to be a valid exercise of a state's police powers. *The New York Central and Hudson River Railroad Co.* v. *John Williams, Commissioner of Labor*, 199 N.Y. 108, 92 N.E. 404 (1910).

Similarly, Massachusetts Gen. Law c. 149 § 148 has existed in some form since 1879 (see Historical Note, MGLA 1982) and in 1885, the justices of the Supreme Judicial Court found a law requiring manufacturers to pay their employees weekly, a constitutional exercise of state power. *In re House Bill No. 123*, 40 N.E. 713, 163 Mass. 589 (1895). Other state statutes also date from the late nineteenth century. *See, e.g.* Pa. Stat. tit. 43 § 271 (Purdon 1964) (enacted in 1891); Wis. Stat. § 109.03, Historical Note (1988) (existing in some form since 1889).



nearly $2 million of which was for wage supplements, primarily vacation wages.

In contrast to the state regulatory system, ERISA does not provide an administrative mechanism for the collection of benefits, 29 U.S.C. § 1132(a).[6] An employee's only remedy for the non-payment of vacation wages would be to sue in court, no matter how small the claim.[7] However, in most instances, where an employee has been denied accrued vacation pay, the amount of money involved is too small to warrant hiring an attorney and initiating a private lawsuit.[8] Thus, federal preemption of this area would deprive citizens of their only true remedy when they are denied accrued vacation pay.

Accordingly, *amici curiae* urge the Court to reverse the decision of the Massachusetts Supreme Judicial Court. Payment for unused vacation pay at the end of employment is a payroll practice like all other kinds of vacation wage payments. Preemption of enforcement of employer obligations to pay earned but unused vacation pay would create an arbitrary and fractured system of regulation and would

6. The United States Department of Labor, Office of Pension and Welfare Benefit Programs, does employ investigators to investigate complaints under ERISA. Their principal function, however, is to inspect trust fund records to discover mismanagement or fraud in the handling of fund assets by fund trustees, not to assist employees in obtaining earned but unpaid benefits.

7. Federal court would be available in all cases. Thus, as the Court of Appeals for the Seventh Circuit has warned, federal preemption of vacation pay "could bring a host of trivial cases into the federal courts," *National Metalcrafters Division of Keystone* v. *McNeil*, 784 F.2d 817, 823 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 403 (1986).

8. In 1987, the New York State Department of Labor collected $1,736,000 in wage supplements on behalf of 2,327 citizens. Thus, the average claim was for $746.

deprive workers of any meaningful remedy for recovering vacation wages. We urge the Court to preserve state authority in this traditional area of state regulation which is of critical importance to working people.

## POINT II

### MASSACHUSETTS GENERAL LAW c. 149 § 148 IS A "GENERALLY APPLICABLE CRIMINAL LAW" EXCLUDED FROM ERISA PREEMPTION

By creating an exception to ERISA's broad preemption provision for state criminal laws, Congress acknowledged the fundamental right of states to devise and enforce penal sanctions. Many state laws, including New York State Labor Law § 198-c and Massachusetts General Law c. 149 § 148, criminalize an employer's knowing refusal to pay earned vacation pay to workers. Such laws apply equally to situations in which benefits are covered by ERISA and those that are payroll practices. Since such laws do not solely govern conduct *vis-a-vis* ERISA-covered benefit plans, they are "generally applicable criminal laws" and therefore not preempted by ERISA.

ERISA excludes "generally applicable criminal laws" from its preemption provision but does not specifically define the phrase. As shown by the plain meaning of the provision, its legislative history, this Court's use of the term "generally applicable" in analogous contexts, and the general policy against federal interference in state criminal enforcement, the term "generally applicable," means laws that apply generally rather than exclusively to ERISA-covered areas. Thus, this provision exempts criminal wage



and benefit collection statutes, which apply generally to all manners of payment of benefits by employers, including those not covered by ERISA, from ERISA's preemption provision.

The plain meaning of the term "generally applicable criminal law" is a criminal law which applies generally rather than to "specific instances." The word "generally" is defined as "in a reasonably inclusive manner: in disregard of specific instances and with regard to an overall picture." *Webster's Third New International Dictionary* (1981). In the context of ERISA preemption, "specifically applicable criminal laws" would be laws pertaining specifically to ERISA benefit plans. Criminal wage and benefit collection statutes, on the other hand, cover the "overall picture" of enforcing all types of promised payments to employees rather than the specific area of ERISA plans. Thus, the "plain meaning" of the phrase "generally applicable" demonstrates that such laws are not preempted by ERISA.

This conclusion is supported by the principles applied by this Court that analysis of whether a state law is preempted by ERISA "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). Preemption is not presumed unless "the nature of the regulated subject matter permits no other conclusion, or . . . Congress has unmistakably so ordained." *Id.* at 522.

Moreover, federal preemption of state criminal laws is not to be lightly presumed since "[t]he right to formulate

and enforce penal sanctions is an important aspect of the sovereignty retained by the States," *Kelly* v. *Robinson*, 479 U.S. 36 (1986). Exercise of a state's police powers "should be respected unless there is a clear collision with a national law." *Kesler* v. *Department of Public Safety, Financial Responsibility Division, State of Utah*, 369 U.S. 153, 172 (1962).

Mindful of these concerns and respecting the traditional exercise of state police powers in the area of employee rights, Congress devised an exception from ERISA preemption for criminal laws. The exception represents a compromise of its goal in ERISA of consistency in the law governing employee benefit plans in favor of the right of states to devise and implement criminal laws even those which may relate to employee benefit plans. Allowing the states to continue to treat behavior they believe to be so detrimental to the public as to merit criminal sanctions undermines to some degree the goal of consistency. Had Congress believed that perfect consistency in regulation was a paramount goal of ERISA, however, it would have made no exception whatsoever for criminal laws in the preemption provision. *See, generally, Alessi* v. *Raybestos-Manhattan, Inc.* 451 U.S. at 523 n.19 ("The scope of federal concern is, however, limited by ERISA itself"). Thus, while the statute broadly supersedes any and all state laws which may now or hereafter "relate" to any employee benefit plan with its coverage, it explicitly preserves state regulation of "generally applicable criminal law[s] of a State" 29 U.S.C. § 1114(b)(2)(B)(4).

Early drafts of ERISA did not contain as broad a preemption provision as the version which became law. The



Senate version of the bill preempted only state laws which "relate to the subject matters regulated by this Act" and an earlier House version of the bill preempted only laws relating to reporting, disclosure, and fiduciary responsibilities. "Summary of Differences Between the Senate Version and House Version of H.R. 2 to provide for Pension Reform," *reprinted in 3 Legislative History of the Employee Retirement Income Security Act of 1974* at 5282-83 (1976) (*"Legislative History of ERISA"*). Neither of these earlier versions excluded state criminal laws from preemption. The bill which emerged from the conference committee shortly before its passage contained the current broad preemption provision and an exception for state criminal laws.

Congress's rationale for the broadened preemption provision was to eliminate "the threat of conflicting and inconsistent State and local regulation . . . with the narrow exceptions specifically enumerated." Statement of Rep. Dent, Congressional Record, August 20, 1974, *reprinted in* 3 *Legislative History of ERISA* at 4670. In discussing why the conference committee had expanded the preemption provision from the earlier versions, Senator Jacob Javits, a sponsor of the bill, told the Senate that the earlier versions "opened the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme." Report of the Committee of Conference, *reprinted in* 3 *Legislative History of ERISA* at 4770-71.

Very little guidance about the meaning of the term "generally applicable criminal laws" is provided by the

legislative history. The joint explanatory statement of the conference committee states, without elaboration, that "the pre-emption provisions will not apply to any criminal law of general application of a State." 3 *Legislative History of ERISA* at 4650. The only reference to the exception which sheds some light on its meaning was made by Senator Javits in his report on the conference committee changes:

> In view of Federal preemption, state laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application—establishing State termination insurance program, et cetera, will be superseded.

3 *Legislative History of ERISA* at 4771. In other words, according to Senator Javits, even a state law which imposed criminal penalties on the failure to contribute to an ERISA-covered plan would not be superseded if it was a law of general application.

As the history demonstrates, Congress was concerned with preserving state criminal laws, but was wary of the states' attempting to elude the preemption provision. Senator Javits spoke of how the earlier, less broad, versions of the preemption provision opened the door to "state laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme." 3 *Legislative History of ERISA* at 4770-71. By limiting the exception to "generally applicable" criminal laws, Congress eliminated the risk that states might hastily enact criminal laws aimed specifically and solely at ERISA plans. Congress did not intend, however, to preclude state enforcement of criminal



laws affecting ERISA plans and other areas. Thus, the legislative history of the state criminal law exception supports the conclusion that Congress intended to save from ERISA preemption state laws which criminalize conduct related to ERISA-covered benefit plans as long as the law is not directed solely at ERISA plans. Since the Massachusetts law reaches beyond ERISA plans, the law is not preempted.

This Court has interpreted the phrase "generally applicable law"[9] consistently with this definition in the related field of labor relations where this Court has dealt often with the relationship between the National Labor Relations Act ("NLRA") and state laws "of general applicability." *See, e.g., Farmer* v. *United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290 (1977). The Court has found laws applicable to the employment relationship to be "generally applicable," *New York Telephone Co.* v. *New*

9. Lower courts which have analyzed the phrase "generally applicable criminal law" have split on whether wage collection statutes should be considered generally applicable criminal laws. Some courts have found such statutes to be within the exception because they are penal statutes which apply generally to all employers. *See Upholsterer's International Union Health and Welfare Fund Trustees* v. *Pontiac Furniture, Inc.*, 647 F. Supp. 1053 (C.D. Ill. 1986); *National Metalcrafters Division of Keystone* v. *McNeil*, 602 F. Supp. 232 (N.D. Ill. 1985), *rev'd on other grounds*, 784 F.2d 817 (7th Cir. 1986); *Goldstein* v. *Mangano*, 99 Misc. 2d 523, 417 N.Y.S.2d 368 (1978).

Other courts, like the Supreme Judicial Court of Massachusetts in this case, have interpreted the exception to apply only to criminal laws that apply to conduct which could be committed by all citizens rather than just employers. *Sforza* v. *Kenco Construction Contracting*, 674 F. Supp. 1493 (D. Conn. 1986); *Baker* v *Caravan Moving Corp.*, 561 F. Supp. 337 (N.D. Ill. 1983); *Trustees of Sheet Metal Workers International Association Production Workers' Welfare Fund* v. *Aberdeen Blower and Sheet Metal Workers, Inc.*, 559 F. Supp. 561 (E.D.N.Y. 1983); *Commonwealth* v. *Federico*, 383 Mass. 485, 419 N.E.2d 1374 (1981).

*York State Department of Labor*, 440 U.S. 519 (1979), and has not limited the term's meaning to include only laws that apply to the entire population.

In *New York Telephone*, this Court declared that the New York State unemployment compensation statute which provided unemployment benefits for striking employees, and laws like it, were "state laws of general applicability that protect interests 'deeply rooted in local feeling and responsibility.'" *Id.* at 540. Thus, in the Court's view, whether the state law is a law of a general application does not depend on whether it affects the entire population or only employers, as in the case of state unemployment compensation laws, as long as it was not "directed specifically" at an area covered by the federal law. In precisely the same way, the Massachusetts law and other criminal wage collection statutes are general laws not aimed specifically at areas covered by ERISA, that protect interests deeply rooted in local feeling.

In the specific area of ERISA preemption, in *Bucyrus-Erie Co.* v. *Department of Industry and Labor*, 599 F.2d 205 (7th Cir. 1979), the Court of Appeals for the Seventh Circuit recognized that the exception for generally applicable criminal laws meant that Congress intended to "preempt criminal statutes limited in application to welfare benefits," but not other criminal laws. *Id.* at 208. The Court called the Wisconsin Fair Employment Act, a civil law, " a statute of general application . . . not specifically designed to regulate an employer's administration of welfare benefit plans. *Id.* at 208. Thus, the Seventh Circuit's interpretation of "generally applicable" is consistent with the one presented here that ERISA preempts only



criminal statutes limited in application to ERISA-covered benefit plans.

Moreover, when Congress has used the term "generally applicable law" in another statute, its meaning has also been consistent with the one presented here. The Federal Bankruptcy Act states that a bankruptcy trustee's powers are subject to generally applicable laws which give other parties an interest in property. 11 U.S.C. § 546(b).[10] The notes contained in the History section following the law in United States Code Service, 11 U.S.C. § 546, state that "[t]he phrase 'generally applicable law' relates to those provisions of applicable law that apply both in bankruptcy cases and outside of bankruptcy cases." Thus, consistent with this interpretation, "generally applicable criminal laws" in the ERISA context are those laws which apply both in ERISA cases and outside of ERISA cases. Massachusetts General Law c. 149 § 148 is such a law.

A generally applicable criminal law is a general law applying to both ERISA preempted areas and non-ERISA preempted areas. The term's usage in other areas of the law and the policy against federal interference in the area of state criminal laws support this view and provide what the legislative history does not, a precise definition of the term. Accordingly, Massachusetts General Law c. 149 § 148, and other criminal wage collection statutes throughout the country are not preempted by ERISA.

10. Section 546 (b) reads, "[t]he rights and powers of a trustee under sections [cites omited] are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection."

## Conclusion

For all of the foregoing reasons, this Court should reverse the decision of the Supreme Judicial Court of Massachusetts.

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Respectfully submitted,

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